On the main question I am prepared to adhere to the interlocutor of the Sheriff and of the Lord Ordinary.

Lord Shand—I am not sorry that your Lordships have decided to affirm the judgment of the Sheriff and the Lord Ordinary, because the result of coming to an opposite conclusion would undoubtedly be to give to the heritable creditor a preference which, speaking for myself, would, I think, be most undesirable, although, no doubt, the law does sanction such preferences. While, therefore, I would most willingly agree with your Lordships, I find myself unable to do so.

The 102d section of the Bankruptcy Act of 1856 provides for the vesting of the estate of the debtor in the trustee as at the date of the sequestration, and the 118th section provides that poindings of the ground which had not been carried into execution by sale sixty days before sequestration, and poindings of the ground after sequestration, were to be made available in competition with the trustee only for the interest on the debt for the current half year, and for one year's arrears of interest. In the case of the *Royal Bank* v. *Bain* the Court held that the repeal of the 118th section of the Bankruptcy Act of 1856 by the Conveyancing Act of 1874 left the right of the poinding creditor to be regulated by section 102 and the common law. The heritable creditor here should have proceeded to the ground and poinded the goods upon it at the time of the sequestration. He delayed to do so, and before his summons was executed some of the goods and machinery had been removed by order of the judicial factor. No doubt a judicial factor is entitled to carry on a going business if he considers it desirable to do so, or he may sell goods of a perishable character, but all this is for the conserving of the estate, and for the purpose of preventing loss; but here the judicial factor appointed for the benefit of the general body of creditors had removed articles in order to defeat a preference which I think might be legitimately secured by a heritable creditor. This, I am of opinion, was a proceeding which the judicial factor was not entitled to take. I do not dispute that if wrong has been done, that wrong may be vindicated by an action of damages, but I am clearly of opinion that the rights of the heritable creditor have been defeated by an act of an officer of Court. As the judicial factor avows he was acting in the interest of the general body of creditors, and as the general body of creditors has adopted that manner of acting, he has sold the articles, and the proceeds of the sale of those articles are retained for them. I am of opinion that the heritable creditor is entitled to follow these proceeds into the hands of the creditors who have retained them, and that he is entitled to be ranked in the sequestration in terms of his claim.

The Court pronounced this interlocutor:—

"In respect the appellant as an heritable creditor has not secured any preference over the moveables belonging to the bankrupt estate beyond what has been sustained by the interlocutor of the Sheriff-Substitute, and cannot, in the form of a claim for a preference on the said moveables or their price, obtain a remedy for the wrong and injury which he alleges was committed against him by the judicial factor, Adhere to the interlocutor of the Lord Ordinary reclaimed against, but reserving to the appellant all other remedy competent to him for redress of said alleged wrong and injury, and decern."

Counsel for Appellant — Lorimer — Moody Stuart. Agents—Henderson & Clark, W.S.

Counsel for Respondent—Pearson — Salvesen. Agents—Murray & Miller, S.S.C.

Tuesday, June 19.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

BROWN AND OTHERS (BARBOUR'S TRUSTEES) *v.* HALLIDAY.

(See *Barbour* v. *Halliday*, July 3, 1840, 2 D. 1279.)

Evidence—Proof of Right to Long Lease—Competency of Parole Evidence.

In a suspension of a decree in absence finding and declaring that the respondents had right to a lease for 999 years of certain heritable subjects, the respondents produced the lease (which was not, however, their writ, but was recovered by them under a diligence, and formed part of a process of removing in which their author had been ordained to remove from the subjects), and also a letter from the heir-at-law of the original tenant, from which it appeared that he had been willing to sell to their author his right under the lease. They also produced an account showing that this sum had been paid, and certain receipts for "feu-duty" of exactly the amount payable as rent under the long lease. No assignation to the lease was produced. They offered parole proof that their predecessors had possessed and had been acknowledged as tenants under the lease. The Court (*diss.* Lord Rutherfurd Clark) *held* that the evidence was incompetent, and *suspended* the decree.

In 1881 the trustees of the late William Barbour of Dunmuir House, Castle-Douglas, raised an action of declarator against James Halliday for the purpose of having it found and declared that the pursuers "had the only good and undoubted right to a lease or tack (for 999 years) dated the 18th day of July 1814, granted by the deceased John M'Intyre, slater in Castle-Douglas, in favour of the deceased Samuel Halliday, who resided in Castle-Douglas, and to the subjects thereby leased," and described in the conclusions of the summons. They averred—"The said Samuel Halliday occupied the subjects let to him by the said tack until his death, which took place on or about the 8th day of May 1829. Thereafter his heir-at-law, Samuel Oliver, residing in Dumfries, sold the said lease or tack to the deceased James Barbour of Dunmuir, sometime writer in Castle-Douglas, conform to assignation in his favour. The said James Barbour continued in the possession of the said leasehold subjects down to the date of his death on 29th August 1845, when he was succeeded in

the possession thereof by his son and general disponee, the also now deceased William Barbour, who resided at Dunmuir House, Castle-Douglas. The said William Barbour's right to the said leasehold subjects was repeatedly acknowledged by the said John Halliday, his agent James Muir, and Hugh Halliday, who until his death, which took place on the 15th day of March 1868, uplifted the rent under the said lease from the said William Barbour as the tenant thereof. The said William Barbour remained in the undisturbed and undisputed possession thereof until shortly before his death, which happened on 21st June 1879."

They further averred that the action had become necessary owing to the defender having threatened to put other parties in possession of the leasehold subjects.

The long lease was not produced in process, nor was the assignation in favour of James Barbour.

The Lord Ordinary (M'Laren), in respect of no defences being lodged, decerned and declared in absence in terms of the conclusions of the summons.

In July 1882 this bill of suspension of the above decree was presented by James Halliday, who stated, *inter alia*, the following reasons for suspension:—By disposition dated 8th July 1841 the deceased Samuel Halliday and Robert Aitken sold and disponed to John M'Intyre a plot of ground in Castle-Douglas. The subjects contained in the long lease, to which the respondents' decree in absence declared them to have right, formed the southern half of the plot of ground. Thereafter in the same year John Halliday bought the piece of ground from John M'Intyre. M'Intyre executed no disposition in favour of Halliday, but delivered over the title-deeds to him. Halliday entered into possession and openly held possession of the ground until the year 1818, when he went to America. During his absence James Barbour, the father of William Barbour (whose testamentary trustees were the respondents in the case), having had the said title-deeds deposited with him as a pledge or hypothec for the payment of the contents of a certain bill of exchange, wrongfully assumed possession of the said subjects without any title. He sold the subjects to a person named Gordon, but they were afterwards reconveyed to him by Gordon. On the said John Halliday's return, however, to this country in 1834, he presented a petition to the Steward-Substitute of Kirkcudbright for delivery of his title-deeds. The grounds of the application were that his brother Hugh had without his authority pledged his titles as security for payment of a bill of £3. In defence James Barbour maintained that he had lent money on security of the pledge of the titles to these subjects, and others adjacent, which he pleaded could not be required back till that security was purged. On the 31st March 1837 James Barbour was ordained by the Steward-Substitute to deliver them up. On appeal this interlocutor was adhered to. John Halliday having succeeded in the action against James Barbour for delivery of the titles, presented on May 23, 1837, a fresh petition craving the Steward-Substitute to decern and ordain James Barbour to remove himself, his tenants, and effects from the subjects in question, in order that he (John Halliday) might obtain possession. The long lease was produced in this process as one of John Halliday's titles. On April 26, 1838, the Steward-Substitute gave decree in terms of the prayer of the petition, and this judgment was also affirmed by the Court of Session. James Barbour ultimately removed from the whole of the subjects, including those contained in the long lease above described. In order to make a valid feudal title, John Halliday obtained from the said John M'Intyre a disposition in his favour of the subjects, dated 22d March 1838. John Halliday occupied and possessed the subjects till the year 1848, when, by disposition dated 10th July 1848, he conveyed them to and in favour of his brother Hugh Halliday, who was duly infeft. The complainer in this case was the eldest son of the said Hugh Halliday, and was thus in right of said subjects as his heir-at-law in heritage. Hugh Halliday occupied the ground till his death in 1868. Thereafter his widow continued to occupy it for her son James Halliday, the complainer, till her death, which took place on 31st July 1879. Since 1872 the said subjects had been in the occupation of Mrs Haugh, the complainer's sister, and her husband John Haugh, mason, Castle-Douglas, jointly with the late Mrs Halliday till her death, and they had since that date continued their occupation under the complainer.

In answer the respondents, besides repeating averment contained in the summons of declarator, that James Barbour, father of William Barbour, whose trustees they were, had bought right to the lease from Samuel Oliver, heir-at-law of Samuel Halliday, the original tenant, made the following averments—"When the said Hugh Halliday acquired the said subjects he raised an action for the arrears of rent under said long lease against William Barbour, and got decree, and subsequently drew the rent each year from him till he died. The suspender being abroad, no rent was paid after Hugh's death, but William Barbour occupied the subjects and let the house to his tenants, till the local authority or commissioners of police ordered the house to be pulled down, being ruinous. After this the said William Barbour, on the application of Mrs Halliday, Hugh's widow, allowed her the use of the ground contained in the lease to plant potatoes on, and in this way she, and after her John Haugh, got into possession. He married a sister of the suspender, and went to live with the widow, with whom his wife had resided and was residing. Mr Barbour made various attempts to put them out. He raised an action against Haugh, and subsequently gave notice to Mrs Halliday to quit possession, but she died before proceedings were begun. The complainer was never in the occupation of the subjects in the lease." With reference to the litigation between Halliday and Barbour, they explained that the latter had at one time claimed the whole piece of ground, and that the decree obtained by Halliday referred to the ground other than that contained in the long lease.

The respondents produced a letter from Samuel Oliver, heir-at-law of Samuel Halliday, to Mr James Barbour, dated 7th March 1833, in which he said—"With respect to returning the £10 which Gordon paid to my grandmother for her share of the feu, I have to say, that if you do not wish to keep that part of it, she is quite

willing to return the money and take it off your hands. But regarding your dispute with M'Intyre I have nothing to do, and do not understand how I am liable to any expenses attending it. You will recollect, I have no doubt, that I mentioned distinctly when the sale took place that I wished to have nothing to do with the transaction, and would run no risk of incurring any expenses. I bound myself in my letter to Gordon to return him the purchase money if he desired it, but my obligation went no further, and seeing that the dispute was not about the part my grandmother sold him, I do not think that either she or I should be called on to pay anything more than the purchase money." . . . They also produced an entry in a valuation of a house erected by Gordon on the ground of the sum of £10 as cash paid by Gordon to Samuel Oliver "for the back-house." They further produced a letter from Mr James Muir, writer, Castle Douglas, agent for John Halliday, to Mr James Barbour, dated 5th May 1832, in which the following paragraph occurred:—"As to the feu-duty which you mention having advanced, you will be settled with, so far as it is correct, as stated in my former letter, but Hugh Halliday imagines that it includes the feu-duty payable by the back-feu sold to you by Samuel Halliday's heir." Further, they produced certain receipts, dated in 1858, 1860, and 1861, which bore to be for "feu" or "ground" rent, for 8s., which was the sum payable as such under the long lease. These receipts were signed by Hugh Halliday, but not holograph.

The complainer pleaded—"(1) The respondents' statements are not relevant, nor, *separatim*, sufficiently specific to be remitted to probation."

The respondents pleaded—"(2) The complainer having set forth or established no facts relevant to set aside the decree in absence, the suspension should be refused. (4) The respondents' predecessors having been acknowledged and dealt with as lessees in said subjects, and rent having been enforced from and paid by them, the complainers are not entitled to set aside the decree."

The respondents (having taken a diligence for the purpose) recovered the lease, which formed one of the documents produced in the process at John Halliday's instance for decree of removing against James Barbour, in which, as already stated, he obtained decree. They did not produce any assignation to Barbour of the lease, but they averred on record that such assignation had been executed by Samuel Oliver, heir-at-law of Samuel Halliday, from whom they alleged that Barbour had acquired the lease.

The Lord Ordinary (M'Laren) suspended the decree in absence complained of, and whole grounds and warrants thereof.

"*Opinion.*—In this suspension I have to consider whether the respondents are able to support the decree which they obtained in absence in the Court of Session. The decree declares that the respondents have the only good and undoubted right to a lease or tack for 999 years of certain subjects in Castle-Douglas. The respondents after taking a diligence have recovered the lease, but have failed to recover the assignation, which is the foundation of their right, and in the present question I think I must hold the assignation to be non-existing. The respondents offer a series of receipts, bearing to be for feu-duty, in evidence of their right. The term feu-duty suggests a right in perpetuity; but a tenancy in perpetuity must be constituted in writing, and it is a general rule that rights constituted by writing are only transmissible by writing. Therefore, unless some authority can be shown for treating such cases as the present exceptionally, I must apply the general rule. I am not entitled to relax the rules of evidence generally applicable to heritable titles merely because this case raises a specialty which has not occurred before. I do not think that in this question a distinction can be taken between the case of a feu and that of a perpetual lease. The receipts in question would not be legal evidence of the assignation of a feu-right. If so, it would be a strange conclusion to hold that these documents were evidence of the assignment of a right of the same quality but of a different denomination. The respondents do not propose to institute an action of proving the tenor of the alleged assignation. I must therefore suspend the decree and find the suspenders entitled to expenses."

The respondents reclaimed, and argued—A proof should in the circumstances be allowed. The respondents offered to prove that they or their predecessors in title had been in possession under the long lease since the date of its execution, and this with the writings produced was sufficient to instruct their right to the lease.—*Stodart* v. *Dalzell*, &c., December 16, 1876, 4 R. 236. There was in addition to the duplicate of the lease they had recovered a tenant's copy formerly existing which had been assigned to James Barbour when he bought the right to the lease.

The complainer replied—If the long lease was ever delivered (which was not admitted), it must have been renounced, for in 1838 the long lease itself was in John Halliday's hands as one of his titles. No assignation of it to Barbour was produced. James Barbour had laid no claim to the long lease in the proceedings in the action of removing in the Sheriff Court. (2) The receipts were not legal evidence even of a feu-right—certainly not of a right such as was claimed—and the respondents' mere possession was not necessarily referable to the lease contended for.

At advising—

Lord Young—In the action in which the decree of declarator was obtained in absence which is sought to be suspended, the pursuers (respondents here) ask for decree that they, as trustees of the late William Barbour, have the only right to a lease for 999 years dated 14th July 1814, granted by John M'Intyre in favour of Samuel Halliday, and to the subjects let thereby. They produce a lease which corresponds to the lease described in their summons, and undoubtedly it is a lease by M'Intyre to Samuel Halliday, but they have no documents or assignations to connect themselves with Samuel Halliday, the tenant. On record they aver that such an assignation existed, but it seems te have gone amissing. The complainer denies that this assignation ever existed, and as no trace of it had been discovered, I must take the case as if its existence had not been averred. They offer now to prove they are in right of the long lease in virtue of a conveyance from Samuel Hal-

liday's heir, and this they propose to do by parole evidence, with the help of certain receipts for rent or feu-duty. The Lord Ordinary is of opinion that parole evidence cannot be admitted to support the right alleged. The Lord Ordinary states that the respondents by means of a diligence have been able to recover the lease, but when we inquired where it was found, it transpires that it was got out of a process brought by John Halliday to remove the respondents' author from the subjects. That we find is the way in which the lease got into this process. It was produced by John Halliday in his action of removing, he being in possession of it along with his other titles to these subjects and other adjacent lands not included in the long lease. John Halliday having this lease in his possession along with his other titles, left them in the hands of his brother Hugh Halliday and set sail for America. Hugh Halliday owed James Barbour £3, and pledged the whole of his brother's titles with him as security for his debt. When John Halliday returned he presented a petition in the Sheriff Court against Barbour for delivery of his titles, and in that petition stated—what was the truth—that his brother Hugh, without any authority from him, had pledged his titles. The result of that application was that Barbour was ordained to give up the titles, and that point must undoubtedly be held to be *res judicata* between the parties. Thereafter the action of removing to which I have already referred was raised by John Halliday, and the long lease having been produced in it along with John's other titles has somehow been allowed to remain in that process, and the respondents by means of a diligence in this process have succeeded in getting it into their possession. That is the mode in which they have obtained the custody of the most important document on which they found.

If this document is the lease, then there is an end of their case, because it must be held to be in the hands of the landlord, but it is suggested that it is the landlord's duplicate of the lease. Even in that case it is only a duplicate. The respondents say, however, that the other duplicate—the tenants'—exists or did exist, and they propose to prove that by parole evidence. The document they have got goes no further than to prove that such a lease once existed. If it is the landlord's duplicate it goes no further than that; but if it is the only lease, then it suggests very clearly that any right under it has been renounced. They propose, however, to prove that they have right to the lease, and to prove its continued existence in favour of the tenant under it, and its transference to their author, by parole evidence, with nothing to aid it but a letter by the agent of Hugh Halliday and a few receipts.

I think no reason has been suggested sufficient to induce us to make an exception from the ordinary rule of law that a party who avers such a heritable right as a lease for 999 years must support it by writ. The respondents adduce nothing in support of their claim but the lease recovered from another process in the manner I have described. They have no right to found upon it, because their author had already been ordered by a competent Court to deliver it up to its true owner, and since then there has been a process to remove their author from possession of the subjects to which they claim right. That action their author defended, but not on the ground that he had a 999 years' lease of a portion of the subjects. His defence was that he had lent money on security of the pledge of the titles to these subjects and others adjacent. That was an intelligible ground of defence, and the only position he took in that action. His pleas, however, were repelled, and decree of removing was pronounced against him. That result is certainly inconsistent with his being in right of a 999 years' lease of a part of the subjects from which he was decerned to remove. Throughout the whole course of that action he never suggested that he was in right of such a lease, and it is absurd to say that if he had had such a right he would not have pleaded it. He was accordingly ordained to remove in 1838.

The respondents, however, now produce some receipts, in whose handwriting we are not told, from a Hugh Halliday, granted to their author for ground and feu rent about the years 1858 and 1860, and found on them as establishing their rights.

All the original parties to these transactions are now dead. For the last sixteen years the mother of the ostensible proprietor has been living in the premises in dispute without paying any rent. In these circumstances I think this matter an exceptionally strong case for adhering to the rule of law against admitting parole evidence of such a heritable right as is claimed, than one in which we should depart from that rule.

I am, then, for adhering to the Lord Ordinary's interlocutor.

The Lord Justice-Clerk and Lord Craighill concurred.

Lord Rutherfurd Clark—I am rather inclined to take an opposite view, and to hold that the safer course would have been to allow parties a proof of their averments here. I do not mean to go in detail into the grounds of my opinion, but will merely indicate a few considerations which occur to me. The property was acquired in 1814, and there is no question that soon after that the proprietor gave out the lease of 999 years to John M'Intyre; and it is matter of averment and not disputed that possession followed on the lease of 1814, so that the right of property was from that date burdened with a 999 years' lease, and continued so unless it was extinguished in some way. Now, so far as the complainer's case is concerned, I do not see any allegation that the lease was extinguished, and that being so, it would follow that while the property was in the complainer there was a right in some-one else to possess a part of it on long lease. Again, looking to the averment of the respondents, I see it states that possession was continued from 1814 down to the present time. It was commenced by Samuel Halliday, the original tenant; in 1832 it appears his heir Oliver was in possession, and then, after the transaction to which I shall immediately refer, it is said the possession was continued by James Barbour and his representatives to the present time. Consequently not only have we the constitution of the burden, but we have an allegation that the lease has been in enjoyment from 1814 to the present time as a title of possession. It is difficult then to say that the complainer is entitled to stop that possession,

which would be the effect of suspending the decree.

Now, the first question is as to whether the respondents have made sufficient averments to support the decree in absence sought to be suspended, and I look on this as the most difficult part of the respondents' case, for they are not only seeking to maintain possession but to declare a right as existing in them. They say they produce a lease which they acquired by a transaction with the heir of the original tenant Now there is a certain amount of proof offered of this averment—(First) A letter from a person said to be the heir, willing to sell to Barbour for £10, and said to be completed by Barbour paying £10, the account being produced. (Second) There is a recognition of that possession by the landlord as flowing from some title when we see receipts for 8s. a-year as feu-duty or feu-rent, which is exactly the sum payable under the long lease. Now, it is said that all this is to be disregarded by reason of what took place in the process of removing. But I confess that I am not moved by it all. There is nothing exceptional in it except the question of the security or proprietary right which Barbour held. There was no question with regard to the leasehold property at all. Decree was pronounced for the whole subjects, but it was not carried out for some reason for the leasehold subjects, for the allegation is that Oliver continued to possess notwithstanding the decree, and paid ground rent from time to time, and even the ground rent was sued for and received by the proprietor. Now, whatever was the effect of the decree, if we accept the allegation of the respondents here, it is plain it was never acted upon, not because Barbour pleaded the right as a tenant in that action (which he did not), but because after decree had been pronounced he bought the lease up and the landlord recognised him as tenant. But this leaves the respondents in the difficulty as to whether they can connect themselves with the long lease. I think they should have brought the heir into the case to declare the lease in a question with him, and if this had been done I think there would have been less difficulty in their case than if they had tried the question with the proprietor. But I think where they have not followed it out it would have been safe to allow a proof, so that the whole matter might be cleared up.

The Court adhered.

Counsel for Complainer — Pearson — Armour. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Respondents—Scott—Low. Agents —Ronald & Ritchie, S.S.C.

Wednesday, June 20.

SECOND DIVISION.

[Sheriff of the Lothians.

MILLER (TRUSTEE OF ALLAN & CO.) *v.* GUNN & CO.

Sale — Clause of Pre-emption — Bankruptcy — Security over Moveables — Mercantile Law Amendment Act 1856 (19 *and* 20 *Vict. c.* 60), *sec.* 1.

A merchant, in consideration of an advance of £100, granted in favour of the person making the advance a document bearing to be a receipt for that sum as the price of certain goods there and then sold, but "to be returned to me upon repayment of the above amount." Thereafter he became bankrupt, and was sequestrated, and the goods which had remained in his possession till after the sequestration were removed by the creditor. In an action against him by the trustee for delivery of the goods as falling under the sequestration—*held* that the transaction was a sale with a right of pre-emption in the seller's favour, and that the goods did not fall under the sequestration.

On 13th December 1880 Mr Allan, sole partner of Allan & Co., boat-builders in Leith, granted the following document in favour of Mr Gunn of William Gunn & Co., shipping agents, Granton—

"*Leith, December 13th*, 1880.

"I have this day sold William Gunn, of Granton, sixty-nine nets, buoys, and fittings now lying in store in St Ninian's Church building, for the sum of One hundred pounds stg., say £100. The said nets, buoys, and materials to be returned to me upon repayment of the above amount." £100

"Received the above amt. D. ALLAN
13·12·1880."

Allan & Co. had previously been receiving considerable advances from Gunn & Co. to assist them in completing vessels which they were building. The nets were allowed to lie in the premises named in the document quoted above, which were rented by Messrs Allan & Co. On 19th October 1881 the estates of Allan & Co. were sequestrated, and the pursuer Hugh Miller, C.A., was subsequently appointed trustee thereon. On the 20th October, the day following the sequestration, Gunn & Co. sent for and removed the nets. The trustee raised this action against William Gunn & Co. for the purpose of having them ordained to deliver up to him, as trustee, the nets as belonging to the sequestrated estates.

He pleaded — "The nets, buoys, and fittings having been the property and in possession of D. Allan & Co. at the date of their sequestration, and having been illegally taken possession of by the defenders thereafter, decree should be granted ordaining the defenders to deliver them to the pursuer."

The defenders averred that as they required nets in six months' time they had agreed to buy them for £100 from Allan & Co.; that Mr Allan had asked a larger sum, but that they had refused to give more, but had agreed that should the amount be repaid before they might come to use the nets, they should be returned, and this under-